150 FERC ¶ 61,071
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
Norman C. Bay, and Colette D. Honorable.

NextEra Energy Partners, LP
Elk City Wind, LLC
Genesis Solar, LLC
Northern Colorado Wind Energy, LLC
Perrin Ranch Wind, LLC
Tuscola Bay Wind, LLC

Docket Nos. EL14-91-000
EC14-127-000
(not consolidated)

ORDER GRANTING PETITION FOR DECLARATORY ORDER IN PART AND AUTHORIZING THE ACQUISITION OF JURISDICTIONAL FACILITIES UNDER SECTION 203 OF THE FEDERAL POWER ACT IN PART

(Issued February 4, 2015)

1. On August 12, 2014, NextEra Energy Partners, LP (NextEra Partners) and the US Project Companies[1] (together, Applicants) submitted a petition for a declaratory order requesting that the Commission disclaim jurisdiction over the future public offering and sale of certain public securities, and the future acquisition of certain public utilities by NextEra Partners.[2] In the alternative, Applicants request approval under section 203 of the Federal Power Act (FPA)[3] for the future public offering and sale of the public securities, and the future acquisition of the public utilities by NextEra Partners. As discussed below, we grant the Petition in part, and grant authorization under FPA section

[1] The US Project Companies are Elk City Wind, LLC (Elk City); Genesis Solar, LLC (Genesis Solar); Northern Colorado Wind Energy, LLC (Northern Colorado); Perrin Ranch Wind, LLC (Perrin Ranch); and Tuscola Bay Wind, LLC (Tuscola Bay).

[2] Petition for Declaratory Order, Alternative Application for Authorization under Section 203 of the Federal Power Act, and Request for Expedited Action, Docket Nos. EL14-91-000 and EC14-127-000 (Aug. 12, 2014) (Petition).

[3] 16 U.S.C. § 824b (2012).

203(a)(2) in part, subject to certain conditions, for the future acquisitions of interests in certain public utilities by NextEra Partners.

I. Background

A. Overview of NextEra Partners and the Proposed Transactions

2. Applicants state that NextEra Partners is a financing vehicle formed by NextEra Energy, Inc. (NextEra) for the purpose of raising equity capital. Applicants explain that NextEra Partners owns indirect interests in the US Project Companies, each of which is a public utility subject to the Commission's jurisdiction, and that all of the output of the US Project Companies is committed pursuant to long-term contracts. As a result of holding indirect interests in the US Project Companies, NextEra Partners receives "predictable and stable cash flows" and has committed to distribute its available cash to investors holding limited partnership interests, referred to as Common Units, in NextEra Partners.[4] Applicants state that while NextEra Partners is similar in purpose and function to other entities that have monetized the value of contracted for, clean generation resources through public offerings, such as NRG Yield, Inc., NextEra Partners differs in that the Common Units sold to the public are "passive, non-voting securities."[5]

3. Applicants also explain that there is a right of first offer agreement among NextEra Resources, LLC (NextEra Resources), an indirect owner of NextEra Partners; NextEra Energy Operating Partners, LP (NextEra Operating), an indirect owner of the US Project Companies; and NextEra Partners, which holds direct and indirect ownership interests in NextEra Operating. Applicants state that, pursuant to the agreement, NextEra Operating "has a right of first offer for six years to acquire some or all of certain designated wind and solar electric generation subsidiaries of NextEra Resources that are or will be jurisdictional public utilities, prior to any proposed sale, transfer, or other disposition of such subsidiaries by NextEra Resources to third parties" (ROFO

[4] Petition at 12. Applicants note that, on June 27, 2014, NextEra Partners raised approximately $438 million in an initial public offering and sale of Common Units (June 2014 IPO). According to Applicants, despite NextEra Partners' indirect ownership interests in the US Project Companies, no advance Commission approval of the June 2014 IPO was required under FPA section 203 because purchasers of the Common Units sold in the June 2014 IPO were, under the terms of NextEra Partners' partnership agreement (NEP Partnership Agreement), prevented from exercising 10 percent or more of the voting power of NextEra Partners. *Id.* at 1-2.

[5] *Id.* at 12, n.25.

Transactions).[6] Applicants explain that although not addressed in the ROFO Agreement, NextEra Resources may choose, in the future, to extend this right of first offer to cover additional subsidiaries that are or will be public utilities. Applicants further explain that NextEra Resources has no obligation to sell to NextEra Operating any of the public utilities currently designated in the ROFO Agreement or any future public utilities that may become subject to the right of first offer.[7]

4. In the Petition, Applicants request that the Commission issue a declaratory order determining that, under the conditions specified in the Petition, the Common Units are passive, non-voting securities such that (i) the future public offering and sale of additional Common Units, regardless of the amount sold and acquired, and (ii) the potential acquisition by NextEra Partners of additional indirect interests in other public utility subsidiaries of NextEra through exercise of a right of first offer, will not require Commission approval pursuant to FPA section 203.[8] Applicants also request that the Commission find that, to the extent relevant, the proposed transactions will qualify for the benefit of the blanket authorization for non-voting securities.[9]

5. Applicants request that, in the event that the Commission "prefers not to address the proposed transactions in a declaratory order," in the alternative, the Commission approve the transactions under FPA sections 203(a)(1) and 203(a)(2), without making a determination as to jurisdiction.[10]

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[6] *Id.* at 10. The right of first offer agreement is referred to in this order as the ROFO Agreement.

[7] *Id.* at 11.

[8] *Id.* at 2.

[9] *Id.* at 21 (citing 18 C.F.R. § 33.1(c)(2)(i) (2014)). The Commission's regulations provide blanket authorization under FPA section 203(a)(2) for any holding company in a holding company system that includes a transmitting utility or an electric utility to purchase, acquire, or take "any non-voting security (that does not convey sufficient veto rights over management actions so as to convey control) in a transmitting utility, an electric utility company, or a holding company in a holding company system that includes a transmitting utility or an electric utility company." 18 C.F.R. § 33.1(c)(2)(i) (2014). In this order, this blanket authorization is referred to as the Non-Voting Securities Blanket Authorization.

[10] Petition at 21.

6. In this order, we refer to the future public offering and sale of additional Common Units as the Common Units Transactions; the potential acquisitions by NextEra Partners of interests in public utility subsidiaries of NextEra and/or NextEra Resources pursuant to the right of first offer are referred to as the ROFO Transactions.[11] Together, the Common Units and ROFO Utilities Transactions are referred to as the Proposed Transactions.

B. Description of Applicants and Other Relevant Entities

1. NextEra Resources

7. Applicants state that NextEra conducts its operations primarily through two business units: Florida Power & Light Company, a traditional public utility operating in Florida, and NextEra Resources, the parent company of NextEra's competitive generation and trading businesses that was formed to aggregate NextEra's existing competitive generation business. Through its subsidiaries, NextEra Resources owns and operates a portfolio of resources that totals over 18,000 MW of generating capacity located in 24 states and Canada; these resources include over 10,000 MW of wind-powered and solar-powered electric generating facilities. A third business unit, NextEra Energy Transmission, LLC, owns transmitting utilities operating in New Hampshire and Texas.

2. The US Project Companies

8. As noted above, each of the US Project Companies is an indirect, wholly-owned subsidiary of NextEra Operating, in which NextEra Partners holds direct and indirect ownership interests.[12] Each of the US Project Companies' generating facilities is operated by an affiliate, NextEra Energy Operating Services, Inc., which provides field and maintenance services to the US Project Companies, but does not direct or control them. Applicants describe each of the US Project Companies as follows.

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[11] On page 2 of the Petition, Applicants indicate that the utilities to be purchased pursuant to the right of first offer will be subsidiaries of NextEra; on page 10 of the Petition, Applicants indicate that the utilities to be purchased pursuant to the right of first offer will be subsidiaries of NextEra Resources.

[12] Applicants note that NextEra Partners also owns indirect interests in several Canadian electric generation project companies that are foreign utility companies (FUCOs) under the Public Utility Holding Company Act of 2005 and are not subject to the Commission's jurisdiction (Canadian Project Companies). *Id.* at 1, 8. Applicants provide descriptions of the Canadian Project Companies in the Petition. *See id.* at 8-10.

9. Elk City is a wholly-owned, direct subsidiary of Elk City Wind Holdings, LLC, which is a wholly-owned, indirect subsidiary of NextEra Operating. Elk City owns a wind-powered electric generating facility with a power production capacity of 98.9 MW (Elk City Facility). All of the output of the facility is committed to Public Service Company of Oklahoma pursuant to a long-term contract and is sold pursuant to market-based rate authority granted by the Commission. The Elk City Facility is interconnected with the transmission system owned by Public Service Company of Oklahoma, which is within the Southwest Power Pool Balancing Authority Area.

10. Genesis Solar is a wholly-owned, direct subsidiary of Genesis Solar Funding Holdings, LLC, which is a wholly-owned, indirect subsidiary of NextEra Operating. Genesis Solar owns a parabolic trough solar thermal generating facility with a power production capacity of 250 MW (Genesis Solar Facility). All of the output of the facility is committed pursuant to a long-term power purchase agreement with Pacific Gas & Electric Company and is sold pursuant to market-based rate authority granted by the Commission. The Genesis Solar Facility is interconnected to Southern California Edison Company's transmission system, which is located in the California Independent System Operator Balancing Authority Area.

11. Northern Colorado is a wholly-owned, indirect subsidiary of Mountain Prairie Wind Holdings, LLC, which is a wholly-owned, indirect subsidiary of NextEra Operating. Northern Colorado owns a wind-powered electric generating facility with a power production capacity of 174.3 MW. All of the output of the facility is committed pursuant to a long-term power purchase agreement with Public Service Company of Ohio and is sold pursuant to market-based rate authority granted by the Commission. Northern Colorado also owns certain interconnection facilities that interconnect with a transmission line owned by Peetz Logan Interconnect, LLC, an affiliate of Northern Colorado. That transmission line transmits output from Northern Colorado and two other generating facilities to the transmission system owned by Public Service Company of Colorado.

12. Perrin Ranch is a wholly-owned, indirect subsidiary of Canyon Wind Holdings, LLC (Canyon Holdings), which is a wholly-owned, indirect subsidiary of NextEra Operating. Perrin Ranch owns a wind-powered electric generating facility with a power production capacity of 99.2 MW (Perrin Ranch Facility). All of the output of the facility is committed pursuant to a long-term power purchase agreement with Arizona Public Service Company and is sold pursuant to market-based rate authority granted by the Commission. The Perrin Ranch Facility owns interconnection facilities and is interconnected to the Navajo Project Southern Transmission System.

13. Tuscola Bay is also a wholly-owned, indirect subsidiary of Canyon Holdings. Tuscola Bay owns a wind-powered electric generating facility with a power production capacity of 120 MW (Tuscola Bay Facility). All of the output of the facility is committed pursuant to a long-term power purchase agreement with Detroit Edison Company and is

sold pursuant to market-based rate authority granted by the Commission. The Tuscola Bay Facility is interconnected to the transmission system of Michigan Electric Transmission Company, which is located within the Midcontinent Independent System Operator Balancing Authority Area.

3. Utilities Subject to the ROFO Agreement

14. As noted above, pursuant to the ROFO Agreement, NextEra Operating has a right of first offer to acquire some or all of certain designated wind and solar electric generation subsidiaries owned by NextEra Resources and certain of its affiliates that are or will be jurisdictional public utilities.[13] In addition, NextEra Resources may choose, in the future, to extend this right of first offer to cover additional subsidiaries that are or will be public utilities. The utilities designated in the ROFO Agreement are referred to in this order as the Designated ROFO Utilities; potential future ROFO Utilities are referred to in this order as the Future ROFO Utilities.[14]

4. Other Relevant Entities

15. Applicants explain that the limited partnership interests in NextEra Operating are owned by both NextEra Partners and by NextEra Energy Equity Partners, LP (NextEra Equity), a wholly-owned, indirect subsidiary of NextEra. According to Applicants, through NextEra Equity, NextEra has retained approximately 80 percent of the economic interest in the US Project Companies; the remaining 20 percent of the economic interest in the US Project Companies is owned by the Common Unitholders.

16. Applicants also explain that NextEra Partners controls NextEra Operating through its ownership of the general partner of NextEra Operating, NextEra Energy Operating Partners GP, LLC (NextEra Operating GP). According to Applicants, NextEra controls NextEra Partners completely through its indirect ownership of NextEra Energy Partners GP, Inc. (NextEra Partners GP), and through Special Voting Units in NextEra Partners held by NextEra Equity. The Special Voting Units are discussed in further detail below.

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[13] *Id.* at 10. Applicants include the ROFO Agreement in Exhibit I: Contracts with Respect to the Transaction.

[14] Applicants note that the right of first offer under the ROFO Agreement also applies to certain designated Canadian wind electric generation subsidiaries of NextEra Resources that are FUCOs. Applicants state that NextEra Resources may, in the future, choose to extend this right of first offer with respect to other FUCOs. *Id.* at 11.

II. Notice of Filing

17. Notice of the Petition was published in the *Federal Register*, 79 Fed. Reg. 49,304 (2014), with interventions and protests due on or before September 11, 2014. None was filed.

III. Discussion

18. As an initial matter, we note that although Applicants request that the Commission disclaim jurisdiction over the Proposed Transactions or address them under FPA section 203 without making a determination as to jurisdiction, the Common Units Transactions and the ROFO Transactions, while related, are two separate and distinct sets of transactions involving two different types of securities.

19. Accordingly, as discussed in further detail below, we grant Applicants' petition for declaratory order in part and find that the Common Units are passive securities such that the Common Units Transactions do not require prior approval under FPA section 203(a)(1)(A). We find, however, that Applicants require prior approval under FPA section 203 for the ROFO Transactions. As discussed below, we grant that authorization under FPA section 203(a)(2), subject to certain conditions.

A. The Common Units Transactions

1. Applicants' Analysis of the Common Units

20. Applicants state that the Commission has held that the focus of FPA section 203 is on the disposition of control of jurisdictional facilities, however such disposition may be effected, whether though the sale, lease, merger, consolidation, acquisition of securities or otherwise.[15] According to Applicants, the Commission has established that control is exercised through ownership or control of voting securities, and so the Commission has generally not concerned itself with non-voting securities.[16] Applicants assert that in distinguishing between voting and non-voting securities, the Commission has clarified "that the ability to vote on limited matters related to asset preservation does not mean that

[15] *Id.* at 17 (citing *Enova Corp.*, 79 FERC ¶ 61,107, at 61,490 (1997)).

[16] *Id.* (citing *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200, at P 144 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006)).

the securities in question should be considered 'voting securities' that may convey control."[17]

21. In support of their claim that the Common Units are passive securities, Applicants explain that the Common Unitholders will have "no rights whatsoever in the day-to-day management or operations" of NextEra Partners or NextEra Operating, and will have "significantly fewer voting rights than other passive ownership interests that the Commission has found to be non-voting securities."[18] Applicants state that, with the exception of the potential right of Common Unitholders to remove NextEra Partners GP, which is discussed in further detail below, all of the matters upon which the Common Unitholders may vote "have previously been found by the Commission to be consistent with passive, non-voting status."[19] Noting that Common Unitholders' voting rights are subject to certain restrictions and qualifications, Applicants list the matters that Common Unitholders are entitled to vote on as follows:

- Amendment of the NEP Partnership Agreement, subject to NextEra Partners GP's, or a successor general partner's, right to amend the agreement unilaterally for various purposes;

- Amendment of certain collateral agreements relating to ensuring the cash flow of NextEra Partners;

- Consent to or approval of any matters relating to NextEra Operating that require the consent or approval of NextEra Partners under NextEra Operating's partnership agreement, including any amendment of such partnership agreement;

- Approval of the merger of NextEra Partners with or into another entity or sale or other disposition of all or substantially all of its assets;

- Dissolution of NextEra Partners and continuation of its business upon dissolution; and

[17] *Id.* (citing *AES Creative Res., L.P.*, 129 FERC ¶ 61,239, at P 25 (2009)).

[18] *Id*. at 18.

[19] *Id.*

- Withdrawal or removal of NextEra Partners GP, or any successor to NextEra Partners GP, as general partner or transfer of the general partnership interest in NextEra Partners.[20]

22. Applicants state that the limited voting rights held by the Common Unitholders are further restricted, in most instances, through special non-economic, common voting units in NextEra Partners that have been issued to NextEra Equity. In the Petition, Applicants explain the mechanics of how these units, the Special Voting Units, limit the voting rights of Common Unitholders.

23. First, Applicants state that the number of Special Voting Units held by NextEra Equity tracks its limited partnership interest in NextEra Operating relative to NextEra Partner's limited partnership interest in NextEra Operating.[21] As NextEra Equity currently owns an approximate 80 percent limited partnership interest in NextEra Operating, NextEra Equity holds the number of Special Voting Units equal to approximately 80 percent of the total number of outstanding Common Units and outstanding Special Voting Units combined (the combination of outstanding Common Units and outstanding Special Voting Units is referred to as the Outstanding Voting Units).

24. Second, Applicants explain that the Special Voting Units entitle NextEra Equity to vote on most matters upon which the Common Unitholders are entitled to vote, either together with the Common Units or as a separate class. According to Applicants, most matters upon which the Common Units and Special Voting Units are entitled to vote are decided by Unit Majority, subject to exceptions requiring a super majority, including removal of NextEra Partners GP as general partner of NextEra Partners. Depending upon when the vote occurs, Applicants note that Unit Majority means either a majority vote of both the outstanding Common Units, excluding any held by NextEra and its affiliates, and the Special Voting Units voting as separate classes, or a majority vote of the outstanding Common Units and the Special Voting Units voting together as a single class.[22]

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[20] *Id.* at 14-15.

[21] *Id.* at 15.

[22] *Id.* at 16, n.38. Applicants state that during a time period referred to as the "Purchase Price Adjustment Period," Unit Majority means "'the approval of a majority of the outstanding [Common Units] (excluding any [Common Units] held by our general partner and its affiliates) and a majority of the outstanding Special Voting Units, voting as separate classes.'" *Id*. n.38 (quoting Amendment No. 5 to Form S-1 Registration

(continued ...)

25. To illustrate how the Special Voting Units restrict Common Unitholders, Applicants provide an example. Specifically, Applicants demonstrate that the Special Voting Units provide NextEra with the ability to block the removal of NextEra Partners GP as general partner of NextEra Partners. Applicants state that under the NEP Partnership Agreement, the removal of NextEra Partners GP as general partner of NextEra Partners requires (1) the majority approval of the holders of not less than 66 and 2/3 percent of the Common Units and Special Voting Units voting together as a single class, and (2) NextEra Partners receiving an opinion of counsel regarding the continuing limited liability of its limited partners. Removal of NextEra Partners GP is also conditioned upon the approval by Unit Majority of the appointment of a successor general partner. Since, as noted above, NextEra and its affiliates currently hold Special Voting Units through NextEra Equity representing approximately 80 percent of the voting power of the Outstanding Voting Units, Applicants state that NextEra has the ability to block removal of NextEra Partners GP as general partner of NextEra Partners.[23]

26. Applicants state that NextEra will retain the ability to block removal of NextEra Partners GP as general partner unless and until the Common Units Transactions cause NextEra Equity's ownership of Special Voting Units to decrease to 33 and 1/3 percent or less of the voting power of the Outstanding Voting Units. Applicants assert that it is unlikely that NextEra will ever cause NextEra Partners to sell quantities of Common Units in subsequent transactions that would result in NextEra Equity's ownership of Special Voting Units falling below the 33 and 1/3 percent threshold. In addition, Applicants contend that after approval of the Petition (after which any Common Unitholder, together with its affiliates, would be permitted under the NextEra Partners Partnership Agreement to hold up to 20 percent of the voting power of the Outstanding Voting Units "without penalty"), even if NextEra Equity's ownership of Special Voting Units fell to or below 33 and 1/3 percent of the Outstanding Voting Units, there is no "particular likelihood" that any Common Unitholder, together with its affiliates, would at

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Statement of NextEra Energy Partners, LP at 201 (Registration Statement)). After the Purchase Price Adjustment Period, Unit Majority means "'the approval of a majority of the outstanding [Common Units] and the Special Voting Units, together as a single class.'" *Id.* Applicants explain that the Purchase Price Adjustment Period refers to a period of time during which NextEra Equity is obligated to refund to NextEra Partners the purchase price of limited partnership interests in NextEra Operating for the benefit of the Common Unitholders to the extent that NextEra Operating's distributions of cash to NextEra Partners do not meet expected targets. *Id.* (citing Registration Statement at 96-98).

[23] *Id.* at 16.

that point in time actually hold 10 percent or more of the voting power of the Outstanding Voting Units such that it would be presumed capable of exercising control over NextEra Partners under Commission precedent.

27. Applicants state that even in the unlikely circumstance that NextEra Equity's ownership of Special Voting Units fell to or below 33 and 1/3 percent of the Outstanding Voting Units, NextEra Partners GP would nevertheless retain the authority to prevent any Common Unitholder from exercising control pursuant to the Control Reduction Right. According to Applicants, the Control Reduction Right, which is established in the NEP Partnership Agreement, gives NextEra Partners GP the unilateral right, without any approval of the Common Unitholders, to amend that agreement to nullify the voting rights held by any Common Unitholder that, together with its affiliates, holds 10 percent or more of the voting power of the Outstanding Voting Units as "'the General Partner determines to be necessary or appropriate to comply with section 203 of the FPA or an act or order by FERC relating to'" NextEra Partners or any of its subsidiaries.[24]

28. Applicants claim that under the circumstances described in the Petition, the Common Units will, consistent with Commission precedent, constitute non-voting securities, and that no Common Unitholder will have the power to control NextEra Partners or the public utility subsidiaries in which it holds indirect interests. Accordingly, Applicants "condition" the Petition upon:

> (i) no material changes in the rights and obligations of the Common Unitholders and NextEra and its affiliates, as described in [the Petition] and (ii) at any point in time that (A) a Common Unitholder and its affiliates own or control 10 [percent] or more of the voting power of the Outstanding Voting Units and (B) the Common Unitholders, collectively, have the power to remove the [NextEra Partners] general partner as the result of a reduction in the number of Special Voting Units held by [NextEra Equity] below the greater than [33 and 1/3 percent] threshold, either [NextEra Partners GP] will exercise the Control Reduction Right in a manner that will prevent the exercise of control over [NextEra Partners] by any Common Unitholder, or [NextEra Partners] and any necessary parties will seek Commission approval for any such potential exercise of control.[25]

[24] *Id.* at 20 (quoting NEP Partnership Agreement §§ 13.1(g), 13.13).

[25] *Id.*

2. Commission Determination

29. FPA section 203(a)(1)(A) provides that a public utility shall not, without first having secured an order of the Commission authorizing it to do so, sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof with a value in excess of $10,000,000. In the Supplemental Policy Statement regarding FPA section 203, the Commission explained that investments in public utilities that do not convey control may in some cases be considered to be passive investments not subject to FPA section 203(a)(1)(A).[26] The Commission explained that it may find an investment to be passive if, among other things, (1) the acquired interest did not give the acquiring entity authority to manage, direct or control the day-to-day wholesale power sales activities, or the transmission in interstate commerce activities, of the jurisdictional entity;[27] (2) the acquired interest gave the acquiring entity only limited rights (e.g., veto and/or consent rights necessary to protect its economic investment interests, where those rights will not affect the ability of the jurisdictional public utility to conduct jurisdictional activities);[28] and (3) the acquiring entity had a principal business other than that of producing, selling, or transmitting electric power.[29]

30. We find that, based on the facts outlined in the Petition and subject to the condition discussed below, the Common Units are passive investments and will not provide Common Unitholders with the authority to manage, direct, or control the day-to-day activities of NextEra Partners or any of its subsidiaries, or its jurisdictional facilities.[30] Our finding that the Common Units are passive securities is conditioned upon NextEra Equity maintaining ownership of Special Voting Units at a level above 33 and

[26] *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253, at P 54 (2007) (Supplemental Policy Statement).

[27] *Id.* (citing *Milford Power Co., LLC*, 118 FERC ¶ 61,093, at P 35, n.21 (2007)).

[28] *Id.* (citing *D.E. Shaw Plasma Power, L.L.C.*, 102 FERC ¶ 61,265, at P 33 (2003) (*D.E. Shaw*)).

[29] *Id.* (citing *Metropolitan Life Insurance Co.*, 113 FERC ¶ 61,300, at P 6 (2005)).

[30] *See, e.g.*, *D.E. Shaw*, 102 FERC ¶ 61,265 at PP 19-20; *Solios Power LLC* 114 FERC ¶ 61,161, at PP 9-10 (2006).

1/3 percent of the voting power of the Outstanding Voting Units.[31] Without such a condition, as Applicants explain in the Petition, there is the potential for NextEra Partners to offer and sell quantities of Common Units that would result in NextEra Equity's ownership of Special Voting Units falling below 33 and 1/3 percent of the voting power of the Outstanding Voting Units and for NextEra to thereby lose the ability to block removal of NextEra Partners GP as general partner.[32] This condition will help ensure that NextEra maintains control of NextEra Partners.

31. Based on these findings, we conclude that the Common Units Transactions will not result in a change in control that would fall under FPA section 203(a)(1)(A) and, therefore, we disclaim jurisdiction under FPA section 203(a)(1)(A) over the Common Units Transactions.

B. The ROFO Transactions

32. As noted above, we view the ROFO Transactions and the Common Units Transactions as separate and distinct sets of transactions. The Common Units Transactions involve the sale and offering of passive securities and, as conditioned above, will not involve a change in control under FPA section 203(a)(1)(A). The ROFO Transactions involve the acquisition by NextEra Partners of interests in public utility subsidiaries of NextEra and/or NextEra Resources pursuant to a right of first offer. Thus, the ROFO Transactions require prior Commission approval under FPA section 203 because FPA section 203(a)(2) applies to the "purchase, acqui[sition], or tak[ing of] any security,"[33] regardless of whether the securities are passive.

[31] *See* discussion at PP 26-28, *supra*. Applicants state that NextEra will retain the ability to block removal of NextEra Partners GP as general partner unless and until the Common Units Transactions cause NextEra Equity's ownership of Special Voting Units to decrease to 33 and 1/3 percent or less of the voting power of the Outstanding Voting Units.

[32] Petition at 19 ("…the Common Unitholders, as previously indicated, have no power to remove [NextEra Partners GP] as long as [NextEra Equity] continues to own Special Voting Units having more than [33 and 1/3 percent] of the voting power of the Outstanding Voting Units.").

[33] 16 U.S.C. § 824b(a)(2) (2012).

33. Under FPA section 203(a)(4), the Commission is required to approve a transaction if it determines that the transaction will be consistent with the public interest.[34] The Commission's analysis of whether a transaction will be consistent with the public interest generally considers three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.[35] FPA section 203(a)(4) also requires the Commission to find that the transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest."[36] The Commission's regulations establish verification and information requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or a pledge or encumbrance of utility assets.[37]

34. As discussed below, we find that the ROFO Transactions are consistent with the public interest because they will not have an adverse effect on competition, rates, and regulation, and will not result in inappropriate cross-subsidization or a pledge or encumbrance of utility assets.

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[34] 16 U.S.C. § 824b(a)(4) (2012).

[35] *See Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044, at 30,111 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). *See also* Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253. *See also Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). *See also Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005) (Order No. 669), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

[36] 16 U.S.C. § 824b(a)(4) (2012).

[37] 18 C.F.R. § 33.2(j) (2014).

1. Effect on Competition

a. Applicants' Analysis

35. Applicants assert that the Commission should find that the Proposed Transactions will not have an adverse effect on competition in the relevant markets because they do not raise any horizontal or vertical market power concerns.

36. With respect to horizontal competition, Applicants argue that since the Common Units to be issued as part of the Common Units Transactions will not constitute voting securities under the conditions proposed by Applicants, none of the Common Unitholders can be considered affiliates of NextEra Partners, regardless of the amount of Common Units they might own or the electric generation assets that they and their affiliates might own or control. Applicants conclude that because the Proposed Transactions will not result in affiliation of the Project Companies, or any Designated or Future ROFO Utilities, with any third-party generation assets, the Proposed Transactions do not present any horizontal market concerns.[38]

37. Applicants also assert that the Proposed Transactions do not raise any vertical market power concerns. Applicants explain that none of the US Project Companies, or the Designated or Future ROFO Utilities, own or control, or will own or control, any electric transmission facilities (other than generator interconnection facilities) or other inputs to generation that the Commission has indicated could be used to exercise vertical market power (i.e. intrastate natural gas transportation or storage facilities, natural gas distribution facilities, sites for generation capacity development, physical coal supply sources, or ownership or control over who may access coal transportation). Applicants note that the Proposed Transactions will also not result in affiliation of the US Project Companies, or the Designated or Future ROFO Utilities, with any third-party transmission assets.[39]

38. Finally, as part of the alternative request for approval under FPA section 203, Applicants commit to meet the same conditions they propose with respect to their petition for declaratory order. Specifically, Applicants condition their alternative request for approval under FPA section 203 upon:

> (i) no material changes in the rights and obligations of the Common Unitholders and NextEra and its affiliates, as described in [the Petition] and

[38] Petition at 22-23.

[39] *Id.* at 23.

> (ii) at any point in time that (A) a Common Unitholder and its affiliates own or control 10 [percent] or more of the voting power of the Outstanding Voting Units and (B) the Common Unitholders, collectively, have the power to remove the [NextEra Partners] general partner as the result of a reduction in the number of Special Voting Units held by [NextEra Equity] below the greater than [33 and 1/3 percent] threshold, either [NextEra Partners GP] will exercise the Control Reduction Right in a manner that will prevent the exercise of control over [NextEra Partners] by any Common Unitholder, or [NextEra Partners] and any necessary parties will seek Commission approval for any such potential exercise of control.[40]

b. Commission Determination

39. We find that the ROFO Transactions will not have an adverse effect on competition.[41] Specifically, under the circumstances described in the Petition, the ROFO Transactions will not produce a change in market concentration, and therefore do not raise horizontal or vertical market power concerns. The acquisition of the Designated and Future ROFO Utilities by NextEra Partners from NextEra or NextEra subsidiaries will not result in new affiliations between the US Project Companies or any of the Designated and Future ROFO Utilities and third-party generation assets because third-party investors will own passive interests in NextEra Partners as a result of the Common Units Transactions.

40. We note that our finding on this issue is based upon Applicants' representation that the Designated and Future ROFO Utilities are or will be subsidiaries of NextEra at the time of the transactions, and we condition our approval of the ROFO Transactions on that representation. Further, we will authorize the ROFO Transactions for a three-year period, rather than on a permanent basis. We find that a three-year limitation balances the Applicants' need to operate under the requested authorizations with our duty to provide adequate regulatory oversight under FPA section 203. Accordingly, the authorizations expire three years from the date of this order, without prejudice to requests to extend the authorizations.

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[40] *See* Petition at 20-21. *See also* P 28, *supra*.

[41] As discussed above, although Applicants analyze both the Common Units Transactions and the ROFO Transactions together under FPA section 203, we have determined that the Common Units Transactions do not require approval under section 203(a)(1)(A). Accordingly, we here evaluate only the ROFO Transactions under FPA section 203, rather than the both the Common Units and ROFO Transactions.

2. Effect on Rates

a. Applicants' Analysis

41. Applicants contend that the Proposed Transactions will not have an adverse effect on rates charged to either wholesale or transmission service customers because, following the Common Units Transactions, all wholesale sales of electric energy by the US Project Companies, and the Designated and Future ROFO Utilities, will continue to be made pursuant to market-based rate authority granted by the Commission. Applicants state that the Commission has previously held market-based wholesale power sales do not raise concerns about a transaction's possible adverse effect on rates.[42]

b. Commission Determination

42. Based upon Applicants' representation that all wholesale sales of electric energy by the US Project Companies, and the Designated and Future ROFO Utilities, will continue to, or will be, made pursuant to market-based rate authority granted by the Commission, we find that the ROFO Transactions will have no adverse effect on rates.

3. Effect on Regulation

a. Applicants' Analysis

43. Applicants state that the Commission will continue to have the same jurisdiction over wholesale sales of electric energy by the US Project Companies, and the Designated and Future ROFO Utilities, after any Common Units Transactions as before the transactions. Applicants state further that the Proposed Transactions will have no effect on state commission regulation and do not require any state commission approval.[43]

b. Commission Determination

44. We find that the ROFO Transactions will not have an adverse effect on regulation. As explained by Applicants, the Commission will continue to have the same jurisdiction over wholesale sales of electric energy by the US Project Companies and the Designated and Future ROFO Utilities after the ROFO Transactions as before the transactions.

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[42] Petition at 24.

[43] *Id.*

4. Cross-subsidization

a. Applicants' Analysis

45. Applicants contend that because the Proposed Transactions do not involve a franchised public utility associate company that has captive ratepayers, the Proposed Transactions fall within one of the safe harbors identified by the Commission. Further, Applicants state that, based on the facts and circumstances known to them, or that are reasonably foreseeable, the Proposed Transactions will not result in, at the time of the Proposed Transactions or in the future, cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company.

b. Commission Determination

46. We find that the ROFO Transactions will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company. As Applicants note, the ROFO Transactions fall under one of the safe harbors established by the Commission for transactions that do not involve franchised public utility associated companies that have captive ratepayers. In addition, Applicants have provided the appropriate verifications regarding cross-subsidization and the pledge or encumbrance of utility assets.

5. Other Obligations

47. Order No. 652 requires that sellers with market-based rate authority timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.[44] To the extent that the foregoing authorization results in a change in status, Applicants are advised that they must comply with the requirements of Order No. 652. In addition, Applicants shall make any appropriate filings under section 205 of the FPA to implement the ROFO Transactions.

48. Information and/or systems connected to the bulk power system involved in this transaction may be subject to reliability and cyber security standards approved by the Commission pursuant to section 215. Compliance with these standards is mandatory and

[44] *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005). *See* 18 C.F.R. § 35.42 (2014).

enforceable, regardless of the physical location of the affiliates or investors, information database, and operating systems. If affiliates, personnel, or investors are not authorized for access to such information and/or systems connected to the bulk power system, a public utility is obligated to take the appropriate measures to deny access to this information and/or the equipment/software connected to the bulk power system. The mechanisms that deny access to information, procedures, software, equipment, etc., must comply with all applicable reliability and cyber security standards. The Commission, North American Electric Reliability Corporation, or the relevant regional entity may audit compliance with reliability and cyber security standards.

IV. Conclusion

49. As discussed, we grant Applicants' petition for declaratory order in part and find that the Common Units are passive securities such that the Common Units Transactions do not require prior approval under FPA section 203(a)(1)(A).

50. We grant Applicants' alternative request and authorize the ROFO Transactions under FPA section 203(a)(2). This approval is conditioned upon the Designated and Future ROFO Utilities, at the time of a ROFO Transaction: (1) being subsidiaries of NextEra; and (2) possessing market-based rate authority. Further, authorization of the ROFO Transactions will expire three years from the date of this order, without prejudice to Applicants requesting to extend the authorization.

The Commission orders:

(A) The Petition is granted in part, as discussed in the body of this order.

(B) The ROFO Transactions are authorized upon the terms and conditions and for the purposes set forth in the application and upon the conditions set forth in this order. Authorization of the ROFO Transactions will expire three years from the date of this order, without prejudice to Applicants requesting to extend the authorization.

(C) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates, or determinations of cost, or any other matter whatsoever now pending or which may become before the Commission;

(D) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted;

(E) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate;

(F) If the ROFO Transactions result in changes in the status or the upstream ownership of Applicants' affiliated qualifying facilities, if any, an appropriate filing for recertification pursuant to 18 C.F.R. § 292.207 (2014) shall be made;

(G) Applicants shall make appropriate filings under section 205 of the FPA, as necessary, to implement the ROFO Transactions;

(H) Applicants must inform the Commission within 30 days of any ROFO Transactions made pursuant to this authorization; and

(I) Applicants must inform the Commission of any change in circumstances that would reflect a departure from the facts the Commission relied upon in authorizing the transaction.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.